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Security Council Committee established pursuant to resolution 1718 (2006)

Note verbale dated 1 July 2013 from the Permanent Mission of Australia to the United Nations addressed to the Chair of the Committee

The Permanent Mission of Australia to the United Nations presents its compliments to the Chair of the Security Council Committee established pursuant to resolution 1718 (2006) and has the honour to submit the national report of the Government of Australia on the implementation of Security Council resolution 2094 (2013), in accordance with paragraph 25 of that resolution (see annex).

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Annex to the note verbale dated 1 July 2013 from the Permanent Mission of Australia to the United Nations addressed to the Chair of the Committee

Report of Australia to the Security Council Committee established pursuant to resolution 1718 (2006) on the implementation of Council resolution 2094 (2013)

1. In paragraph 25 of resolution 2094 (2013), adopted on 7 March 2013 by the Security Council, the Council called upon all States to report to it within 90 days of the adoption of the resolution, and thereafter upon request by the Committee, on concrete measures they have taken in order to implement effectively the provisions of the resolution, and requested the Panel of Experts established pursuant to resolution 1874 (2009), in cooperation with other United Nations sanctions monitoring groups, to continue its efforts to assist States in preparing and submitting such reports in a timely manner. The present report describes the steps taken by Australia to implement those measures. References in the report to "the Committee" are to the Committee established pursuant to Security Council resolution 1718 (2006) unless otherwise specified.

Measures given effect under the Charter of the United Nations Act 1945

2. Paragraphs 7, 8, 11, 14, 20 and 23 are implemented in Australia by the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 ("the Regulations"). The Regulations were made pursuant to subsection 6 (1) of the Charter of the United Nations Act 1945 ("the Act") and, as such:

- In accordance with section 9 of the Act, the Regulations have effect despite: an act enacted before the commencement of the Regulations; or a law of a state or territory; or an instrument made under such a law; or any provision of the Corporations Act 2001, or the Australian Securities and Investments Commission Act 2001, or regulations made under those Acts; or an instrument made under such a provision.
- In accordance with subsection 10 (1) of the Act, no Act enacted at or after the commencement of section 10 of the Act may be interpreted as amending or repealing, or otherwise altering the effect or operation of, a provision of the Regulations; or as authorizing the making of an instrument amending or repealing, or otherwise altering the effect or operation of, a provision of the Regulations.

Arms embargo — paragraphs 7 and 20

3. Paragraph 20 of resolution 2094 (2013) requires all States to prevent the direct or indirect supply or transfer to or from the Democratic People's Republic of Korea of the items listed in annex III to the resolution, pursuant to paragraphs 8 (a) and 8 (b) of resolution 1718 (2006).

4. Paragraph 7 of resolution 2094 (2013) prohibits the supply to or from the Democratic People's Republic of Korea of any technical training, advice, services or assistance, including brokering or other intermediary services, related to the

provision, manufacture, maintenance or use of items listed in annex III, pursuant to paragraph 8 (c) of resolution 1718 (2006).

5. The Regulations implement the arms embargo established pursuant to paragraphs 8 (a) and 8 (b) of resolution 1718 (2006) by:

- Prohibiting the direct or indirect supply, sale or transfer of "export sanctioned goods" to the Democratic People's Republic of Korea (regulation 9)
- Prohibiting the procurement of "import sanctioned goods" from the Democratic People's Republic of Korea (regulation 10)
- Prohibiting the supply to or procurement from the Democratic People's Republic of Korea of a "sanctioned service" (regulation 11)

6. The items, materials, equipment, goods and technology listed in annex III to resolution 2094 (2013) fall within the Regulations' existing definition of "export sanctioned goods" (regulation 5) and "import sanctioned goods" (regulation 7); that is, goods that have been determined by the Security Council or the Committee under subparagraphs (8) (a) (i) and (ii) of resolution 1718 (2006).

7. The Regulations thereby prohibit the supply to or from the Democratic People's Republic of Korea of the items listed in annex III to resolution 2094 (2013), pursuant to paragraph 20.

8. Regulation 8 of the Regulations defines a "sanctioned service" to include the provision of technical training, advice, services or assistance that relates to the provision, manufacture, maintenance or use of items defined as "export sanctioned goods" and "import sanctioned goods". The Regulations thereby prohibit the supply to or from the Democratic People's Republic of Korea of the services prohibited pursuant to paragraph 7 of resolution 2094 (2013).

9. The Government of Australia is in the final stages of amending the Regulations to clarify that the definition of a "sanctioned service" includes the provision of brokering or other intermediary services, including arranging for the provision, maintenance or use of export sanctioned goods.

Financial sanctions — paragraph 8

10. Paragraph 8 of resolution 2094 (2013) applies the measures established pursuant to subparagraph 8 (d) of resolution 1718 (2006) (financial sanctions) to:

- The individuals and entities listed in annexes I and II to resolution 2094 (2013) and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, including through illicit means
- Any individuals or entities acting on the behalf or at the direction of the individuals and entities that have already been designated, and entities owned or controlled by them, including through illicit means

11. The Regulations give effect to subparagraph 8 (d) of resolution 1718 (2006) by:

- Prohibiting the direct or indirect act of making an asset available to, or for the benefit of, a "designated person or entity" or a person or entity acting on behalf of or at the direction of a designated person or entity (regulation 12)

- Prohibiting the use of or dealing with a "controlled asset" (regulation 13) unless authorized by the Minister for Foreign Affairs under regulation 14

12. A "designated person or entity" is defined to mean a person or entity designated by the Committee or by the Security Council under paragraph 8 (d) of resolution 1718 (2006) (regulation 4). A "controlled asset" is defined to mean any asset that is owned or controlled by either a designated person or entity, or a person or entity acting on behalf of or at the direction of a designated person or entity (regulation 4).

13. As a consequence, the provisions of the Regulations that give effect to paragraph 8 (d) of resolution 1718 (2006) (regulations 12 to 14) apply to a person or entity, or any asset owned or controlled by them, simultaneously upon their designation by the Committee or the Security Council under paragraph 8 (d) of resolution 1718 (2006).

14. The Government of Australia is in the final stages of the legislative process to amend regulation 12 to clarify that the prohibition includes making any asset available to or for the benefit of an entity that is owned or controlled, including through illicit means, by a person or entity acting on behalf of or at the direction of a designated person or entity.

15. Regulation 14 of the Regulations provides that the Minister for Foreign Affairs may grant, on application, a permit authorizing that an asset be made available to a person or entity that would otherwise contravene regulation 12, or a permit authorizing the use of, or dealing with, a controlled asset that would otherwise contravene regulation 13.

16. Regulation 14 limits the Minister's authority to issue such permits to the circumstances mentioned in resolution 1718 (2006) in regulation 5 of the Charter of the United Nations (Dealing with Assets) Regulations 2008, namely:

- A "basic expense dealing", defined to correspond to paragraph 9 (a) of resolution 1718 (2006), or
- An "extraordinary expense dealing", defined to correspond to paragraph 9 (b) of resolution 1718 (2006), or
- A "legally required dealing", defined to correspond to paragraph 9 (c) of resolution 1718 (2006)

Financial services — paragraphs 11, 14 and 15

17. Paragraph 11 of resolution 2094 (2013) requires Member States to prevent the provision of financial services or the transfer to, through or from their territory or by their nationals or entities of any financial or other assets or resources, including bulk cash, that could contribute to the nuclear or ballistic missile programmes of the Democratic People's Republic of Korea, other activities prohibited by relevant resolutions or the evasion of measures imposed by relevant resolutions.

18. The Government of Australia is in the final stages of the legislative process to amend the Regulations to give effect to paragraph 11. The provision of financial services that could contribute to the nuclear or ballistic missile programmes of the Democratic People's Republic of Korea or to other prohibited activities will be included in the definition of a "sanctioned service" under regulation 8.

Regulation 11 of the Regulations prohibits, without exception, the making of a sanctioned service without authorization.

19. To give effect to paragraph 14 of resolution 2094 (2013), the Regulations will also be amended to include the transfer of any financial or other assets or resources, including bulk cash, that could contribute to either the nuclear or ballistic missile programme of the Democratic People's Republic of Korea or any other activity prohibited, in the definition of "sanctioned supply", in regulation 6. Regulation 10 of the Regulations prohibits, without exception, the making of a sanctioned supply without authorization.

20. Paragraph 15 stipulates that Member States shall not provide public financial support for trade with the Democratic People's Republic of Korea, where such support could contribute to the latter's nuclear or ballistic missile programmes or other prohibited activities.

21. The Government of Australia provides public financial support for trade through its export credit agency, the Export Finance and Insurance Corporation. Under a ministerial direction issued in 2009, the Corporation does not provide any products or services that would facilitate trade with or investment in the Democratic People's Republic of Korea.

Luxury goods — paragraph 23

22. Paragraph 23 of resolution 2094 (2013) clarifies that the term "luxury goods" for the purposes of paragraph 8 (a) (iii) of resolution 1718 (2006) includes, but is not limited to, the items specified in annex IV to resolution 2094 (2013).

23. Australia already includes the items specified in annex IV to resolution 2094 (2013) in the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Luxury Goods List 2006. The Regulations incorporate the luxury goods list in the definition of "export sanctioned goods" (regulation 5); that is, goods mentioned in the luxury goods list.

24. The direct or indirect supply, sale or transfer of export sanctioned goods from the Democratic People's Republic of Korea is defined in regulation 6 of the Regulations as a "sanctioned supply", which is prohibited under regulation 9.

Enforcement of the Regulations

25. The Charter of the United Nations (United Nations Sanctions Enforcement Law) Declaration 2009, in accordance with subsection 2B(1) of the Act, specifies regulations 9 and 10 (enforcing paras. 14, 20 and 23), 11 (enforcing paras. 7 and 11), and 12 and 13 (enforcing para. 8) as "United Nations sanction enforcement laws". Contravention of a United Nations sanction enforcement law, or of a condition of a permit granted under United Nations sanction enforcement law (where applicable), is an offence under section 27 of the Act.

26. Each United Nations sanction enforcement law is given the jurisdictional scope to correspond with the obligation it enforces. All apply to conduct when committed, or when a result of the conduct occurs, wholly or partly, in Australia or on board an Australian aircraft or ship.

27. Regulations 9 to 13 also apply (by reference in those regulations to the application of section 15.1 of the Criminal Code 1995) to conduct committed wholly outside Australia by an Australian citizen or an Australian body corporate.

28. Regulations 9 and 10 also apply to conduct committed by a person, whether or not in Australia and whether or not an Australian citizen, using the services of an Australian ship or aircraft.

29. Regulations 9 to 11 further provide that an Australian body corporate is liable for conduct contravening the regulation committed by another body corporate or entity, wherever incorporated or situated, if the Australian body corporate has effective control over the actions of that other body corporate or entity.

30. The current maximum penalty upon conviction for such an offence for individuals is 10 years' imprisonment or a fine the greater of $425,000 or three times the value of the transaction. For a body corporate, the offence is one of strict liability, unless it can prove that it took reasonable precautions and exercised due diligence to avoid contravening the regulation. The maximum penalty upon conviction for bodies corporate is a fine the greater of $1.7 million or three times the value of the transaction.

Measures given effect by other means

Travel ban — paragraphs 9 and 10

31. Paragraph 9 of resolution 2094 (2013) applies the measures established pursuant to paragraph 8 (e) of resolution 1718 (2006) (the travel ban) to individuals listed in annex I to resolution 2094 (2013) and to individuals acting on their behalf or at their direction.

32. Paragraph 10 of resolution 2094 (2013) applies the measures specified in paragraph 8 (e) and the exemptions set forth in paragraph 10 of resolution 1718 (2006) to individuals whom a State determines to be working on behalf of or at the direction of a designated individual or entity or individuals assisting the evasion of sanctions or violating the provisions of relevant resolutions. Paragraph 10 also decides that, where such individuals are nationals of the Democratic People's Republic of Korea, the relevant State shall expel the individual for the purpose of repatriation to the Democratic People's Republic of Korea, subject to the exceptions set out in paragraph 10.

33. Travel bans imposed on designated persons by Security Council resolutions are implemented in Australia by the Migration (United Nations Security Council) Regulations 2007 (the Migration Regulations). The Migration Regulations provide that a person who is or becomes the subject of resolutions of the Council that require Australia to prevent that person from entering or transiting through Australian territory is unable to be granted a visa, or, if a visa has already been granted, may have his or her visa cancelled, consistent with the obligations in the relevant Council resolution.

34. The Department of Immigration and Citizenship maintains a Movement Alert List, which includes the names of non-citizens whose eligibility for a visa grant or continuing eligibility to hold a visa may be an issue. The names of all visa applicants are checked against the List prior to any decision to grant a visa to enter Australia. The List is electronically accessible to officers of the Department of

Immigration and Citizenship posted to the country's diplomatic and consular missions worldwide, although the matching process has been centralized in the Border Operations Centre in the Department of Immigration and Citizenship's National Office. Additional checks are also undertaken at Australian entry points to ensure that any person put on the List subsequent to a visa grant is identified.

Transportation — paragraphs 16 and 17

35. Paragraph 16 of Security Council resolution 2094 (2013), which calls upon States to inspect all cargo within or transiting through their territory on its way to or from the Democratic People's Republic of Korea, and paragraph 17, which requires States to deny entry to vessels that refuse inspection, are given effect in Australia through the Customs Act 1901, which is administered by the Australian Customs and Border Protection Service. Regulation 4Y of the Customs (Prohibited Imports) Regulations 1956 and regulation 13CO of the Customs (Prohibited Exports) Regulations 1958, which are made under the Customs Act 1901, set out, respectively, goods which are prohibited imports from the Democratic People's Republic of Korea and prohibited exports to that country. Such goods include arms and related materiel, goods that are capable of being used in the development, production or stockpiling of nuclear, biological or chemical weapons and goods that are capable of being used in the development or production of ballistic missiles. Both of these regulations have been specified as United Nations sanction enforcement laws.

36. Customs and Border Protection Officers are authorized to search vessels and aircraft and to inspect cargo within Australian jurisdiction, irrespective of whether there are grounds to believe that the aircraft or vessel is transporting prohibited goods. The Customs Act 1901 requires cargo to be reported to the Australian Customs and Border Protection Service prior to import to and export from Australia. This reporting is done electronically through the Integrated Cargo System. Customs and Border Protection uses the Integrated Cargo System to profile and identify cargo that might be prohibited or of risk, such as prohibited imports or prohibited exports in relation to the Democratic People's Republic of Korea. This enables Customs and Border Protection to target, inspect and interdict cargo of concern that might be going to or coming from that country.

Catch-all control — paragraph 22

37. In addition to the measures outlined above, the Autonomous Sanctions Regulations 2011 provides the Minister for Foreign Affairs with the authority to designate goods as export sanctioned goods in relation to a particular country. Where the Minister chooses to do so, the export of the goods in question is prohibited. This prohibition applies extraterritorially to both Australian nationals and non-nationals and includes a prohibition on the use of Australian flag vessels or aircraft to transport the goods.

38. Should Australia determine a need to designate any additional items, beyond those covered by Australia's existing measures under the Charter of the United Nations (Sanctions — Democratic People's Republic of Korea) Regulations 2008 and the Customs (Prohibited Exports) Regulations 1958, that could contribute to the nuclear or ballistic missile programme of the Democratic People's Republic of Korea, activities prohibited by resolutions 1718 (2006), 1874 (2009), 2087 (2013) or 2094

(2013) or the evasion of measures imposed by such resolutions, regulation 4 (3) of the Autonomous Sanctions Regulations 2011 allows for such items to be designated and prohibited for export without prior authorization from the Minister for Foreign Affairs.

39. At the time of writing, the existing measures were sufficient to meet the requirements of paragraph 22 of resolution 2094 (2013), and the Minister had not designated any additional goods as export sanctioned goods in relation to the Democratic People's Republic of Korea under the Autonomous Sanctions Regulations 2011.